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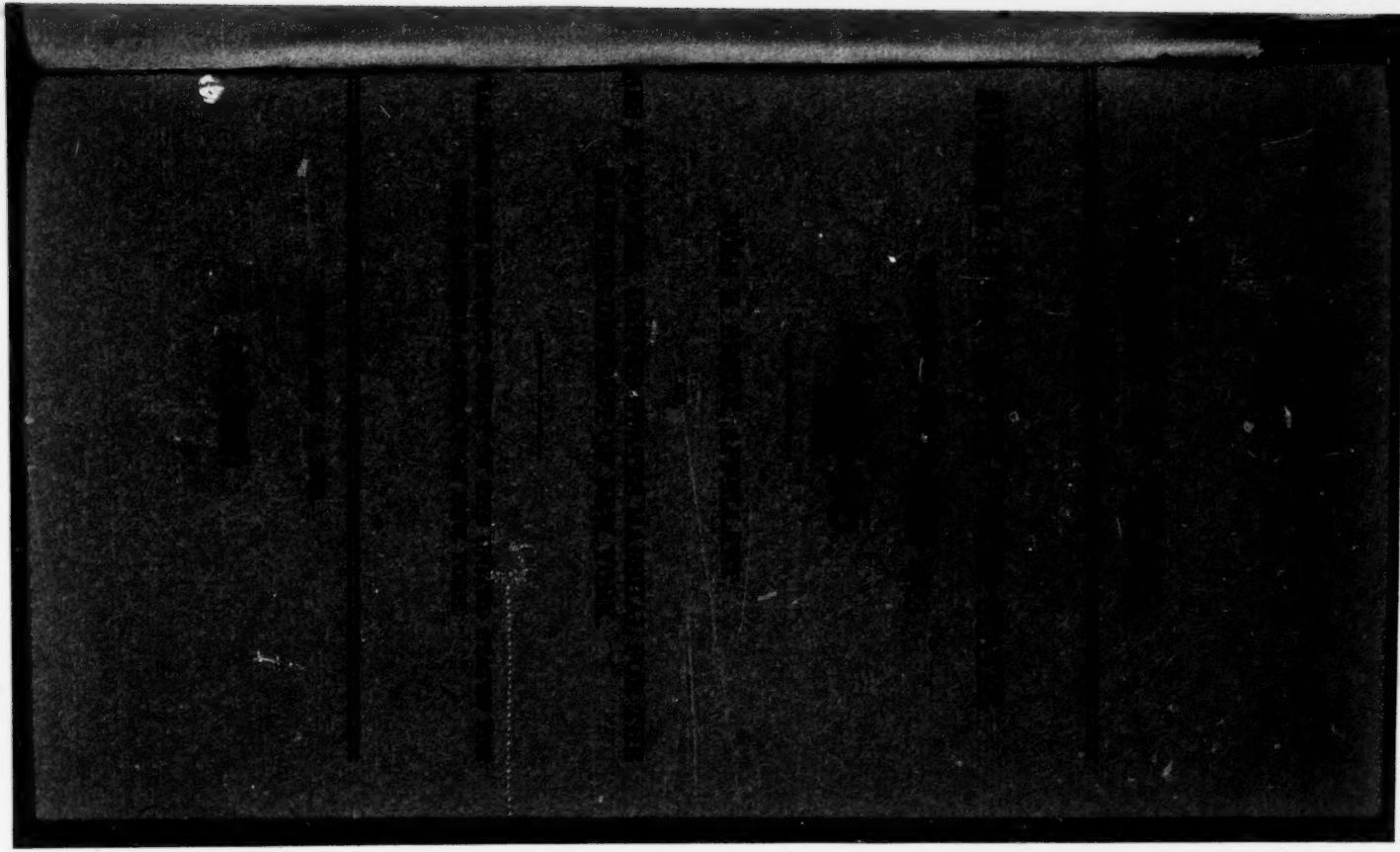

(28,929)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 389.

JOHN H. BREDE, APPELLANT,

vs.

JAMES M. POWERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

& Detweiler (Inc.), Printers, Washington, D. C., February 26, 1923.

Citation.

y the Honorable Thomas I. Chatfield, one of the Judges of the United States District Court for the Eastern District of New York, in the Second Circuit, to James M. Powers, United States Marshal for the Eastern District of New York, Greeting:

You are hereby cited and admonished to be and appear before the ıpreme Court of the United States at the City of Washington in e District of Columbia, 30 days from the date hereof, pursuant an appeal filed in the Clerk's Office of the United States District ɔurt for the Eastern District of New York, wherein John H. Brede appellant and you are appellee, to show cause, if any there be, hy the order and decree in said appeal mentioned should not be ɔrrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Brooklyn in the City of ew York in the District and Circuit aforesaid, this 28th day of ebruary in the year of Our Lord One thousand Nine Hundred nd twenty-two, — the one hundred and forty-sixth. Thomas I. hatfield, U. S. D. J.

Assignment of Errors.

United States District Court, Eastern District of New York.

n the Matter of the Application of JOHN H. BREDE for a Writ of Habeas Corpus.

John H. Brede, makes and files this his assignment of errors:

1. The United States District Court for the Eastern District of ew York, erred in dismissing the writ of habeas corpus and reanding him to custody.

2. Said court erred in holding that imprisonment in the County il of Essex County, New Jersey, is not imprisonment at hard labor.

3. Said court erred in holding that imprisonment in the County il of Essex County, New Jersey, for a term of sixty days is not an famous punishment.

4. Said court erred in holding that the crime for which he was osecuted and was convicted, as set forth in the record herein, is t an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States.

5. Said court erred in holding that the crime for which he was prosecuted and convicted, as set forth in the record rein, can be prosecuted in the United States District Court for e Eastern District of New York, by information and without intment or presentment by the grand jury.

6. Said court erred in holding that the United States District urt for the Eastern District of New York had jurisdiction to prounce the sentence and judgment of conviction in the record deribed.

7. Said court erred in construing and applying the Constitution the United States and particularly the Fifth Amendment thereto,

for the reason said amendment, properly construed and applied required his discharge from imprisonment, same being pursuant t conviction of an infamous crime without indictment or prosecutio by grand jury.

Wherefore he prays that the order and decree made herein b reversed, annulled and held for naught, and for such other relief a may be proper.

Dated, February 28th, 1922. Morris Kamber, Attorney for Ap plicant, Seven Dey Street, Borough of Manhattan, City of Ne York.

4 **Appeal and Allowance.**

[Title omitted.]

Upon the annexed petition and upon the record and all paper had in the cause entitled as above, it is

Ordered that the appeal be allowed, as prayed for, and it is furthe

Ordered that the applicant, John H. Brede, may, at any tim pending said appeal, be enlarged upon executing an undertaking with good and sufficient sureties in the sum of $5,000 for his appear ance to answer any order, judgment or decree, either of the Supreme Court, or of the United States District Court for the Eastern Dis trict of New York, and upon failure to give such undertaking t remain in the custody of the respondent, U. S. Marshal of the East ern District of New York, to be dealt with according to law.

Dated, February 28th, 1922. Thomas I. Chatfield, United State District Judge.

5 [Title omitted.]

The applicant above named, John H. Brede, conceiving himself aggrieved by the order and decree dismissing the writ of habeas corpus, and remanding him to custody, made in the above entitled cause, said cause involving the construction and application of the Constitution of the United States, for the reasons specified in the assignment of errors which is filed herewith, does appeal from said order and decree to the Supreme Court of the United States and prays that this appeal may be allowed, and that a transcript of record, pro ceedings and papers upon which said order was made, duly authen ticated, may be sent to the Supreme Court of the United States.

Dated, February 28, 1922. Morris Kamber, Attorney for Ap plicant, 7 Dey Street, Borough of Manhattan, City of New York.

6 **Writ of Habeas Corpus.**

The President of the United States of America to James M. Power, United States Marshal of the Eastern District of New York, Greeting:

We command you that you have the body of John H. Brede in your custody detained, as it is said, together with the details and cause of his caption and detention, before the Honorable Thomas I. Chatfield, United States District Judge at a Term of the United

States District Court for the Eastern District of New York at the Federal Building at the Borough of Brooklyn, City and State of New York, on the 5th day of January, at 12 o'clock in the noon to do and receive all and singular those things which said Judge and said Court shall then and there consider in this behalf and that you have then and there this writ.

Witness, Honorable Thomas I. Chatfield, and Edwin L. Garvin, Judges of the said District Court on this 5th day of January in the year of Our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and fifty-sixth. Percy G. B. Gilkes, Clerk of the United
7 States *States* District Court, Eastern District of New York, by John C. Leavens, Deputy Clerk. (Seal.)

Allowed by Thomas I. Chatfield, U. S. D. J. January 5, 1922.

8 **Petition for Writ of Habeas Corpus.**

[Title omitted.]

To the United States District Court for the Eastern District of New York, the Honorable Thomas I. Chatfield and Edwin L. Garvin, Judges of said Court:

The Petition of John H. Brede respectfully shows:

1. I am now imprisoned in the Federal Building in the Borough of Brooklyn, City and State of New York, within the Eastern District of New York, by the Marshal of said District and I am restrained of my liberty therein by him.

2. The cause and pretense of my imprisonment, according to my best information and belief, is a purported commitment made by the United States District Court for the Eastern District of New York, Honorable Thomas I. Chatfield presiding, under a pretended conviction of a violation of the Act of Congress of the 28th day of October, 1919, commonly known as the Volstead Act.

9 3. Said imprisonment and restraint are illegal and said pretended judgment of conviction and commitment are void for the following reasons: No presentment or indictment of a Grand Jury was ever found against me. There was filed on or about the 7th day of April, 1920, in the United States District Court for the Eastern District of New York by Leroy W. Ross, then United States Attorney for said District, a certain paper writing in the form of an information, a copy of which is hereto annexed as Exhibit A and made part hereof. I was brought into court and required to plead to said document, and I then and there entered a plea of "not guilty" thereto. Thereafter, on or about the 15th day of June, 1920, I was brought to trial before said Court and a jury upon the charge in said document set out. The jury returned a verdict of "guilty." Thereupon said Court, Honorable Thomas I. Chatfied presiding, in form, pronounced judgment against me that I be imprisoned for 60 days in Essex County Jail, New Jersey, and fined the sum of $500-. Pursuant to said pretended judgment the purported commitment aforesaid was delivered to James I. Powers, the United States

Marshal of said District and he, thereupon, pretending to act pursuant thereto and under no other authority whatever, physically took me into custody, imprisoned me and restrained and yet restrains me of my liberty, as aforesaid. On the day when the paper writing in the form of an information was filed with said Court and upon the day when I was required to plead thereto, as well as when I was
10 tried and judgment was, in form, pronounced against me, by reason of the Statutes of the United States, the States of New Jersey and New York and the arrangements, regulations and agreements made by the Attorney General of the United States his deputies and aids and other officials of the United States acting in its behalf, the United States District Court for the Eastern District of New York and the Judges thereof were authorized and had the authority and power to sentence defendants in criminal causes pending in said Court wherein conviction of the crime charged was by Statute punishable by imprisonment for a term of not more than one year, to imprisonment in jails, penitentiaries and prisons, within the State- of New York and New Jersey, wherein hard labor would necessarily be imposed as an indictment to such imprisonment.

4. For the reason aforesaid the United States District Court for the Eastern District of New York never acquired jurisdiction of the pretended criminal action upon which, in form it tried and condemned me, for the reason that the crime of which I was charged and for which said Court sought to try and condemn me is an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States and no presentment or indictment of a Grand Jury charging same, was ever filed or presented.

I pray therefore that a Writ of Habeas Corpus issue to inquire into the Court of my detention and imprisonment and to
11 discharge me therefrom.

Dated, Brooklyn, New York, January 3, 1922. John H. Brede, Petitioner.

STATE OF NEW YORK,
Eastern District of New York,
County of Kings, ss:

John H. Brede, being duly sworn says:

I am the Petitioner. I have read the foregoing petition and I verily believe that the statements therein made are true. John H. Brede.

Sworn to before me this 5th day of January, 1922. John A. Leavens, Notary Public, Nassau County, N. Y. [Seal.] Certificate filed —— ——.

12 **Return of Respondent.**

[Title omitted.]

To the United States District Court for the Eastern District of New York:

Comes James M. Powers, United States Marshal for the Eastern District of New York, and by way of return to the writ of Habeas

Corpus issued herein on the 5th day of January, 1922, certifies as follows, to wit:

That John H. Brede on the 15th day of June, 1920, was found guilty, after a trial, in the United States District Court for the Eastern District of New York, under an information charging him with a violation of Section 21, Title II, of the Act of Congress of October 28, 1919, and on the 17th day of June, 1920, was sentenced to pay a fine of $5,000 and to be imprisoned for 60 days.

That by an order of this Court of the date of December 17, 1921, the said John H. Brede was ordered to appear in this court on January 3, 1922, to comply with the sentence of the court and
13 that on January 5, 1922, the said John H. Brede was remanded to the custody of your respondent, and held under a commitment issued this day.

That the sentence and order of the court pursuant to which the said John H. Brede was remanded to your respondent's custody were lawful and in accordance with the Statutes and laws of the United States, all of which I hereby certify and have here the body of the said John H. Brede as by said writ I am commanded.

Dated, Brooklyn, New York, January 5, 1922. James M. Power, U. S. Marshal for the Eastern District of New York.

14 **Transcript of Evidence.**

Before Honorable Thomas I. Chatfield, District Judge.

[Title omitted.]

January 9th, 1922.

Appearances: For Relator, Morris Kamber, Esq.; for Respondent, Ralph C. Greene, Esq., U. S. Attorney; Henry J. Walsh, Esq., Assistant U. S. Attorney.

Mr. Walsh filed the return of respondent.

Mr. Walsh offered in evidence the information in the cause of United States v. John H. Brede, together with all the endorsements thereon. Received and considered Respondent's Exhibit 1.

It was stipulated that there has been no indictment or presentment by a grand jury accusing relator of the crime upon conviction whereof he is imprisoned.

It was stipulated that the penal institution to imprisonment in which relator was sentenced is the County Jail of Essex County, State of New Jersey.

Both sides rest.

15 **Order Dismissing Writ of Habeas Corpus.**

[Title omitted.]

A writ of Habeas Corpus having been issued and allowed on the 5th day of January, 1922, directed to the respondent, James M.

Power, United States Marshal for the Eastern District of New York, commanding him to produce the body of the relator forthwith in the United States District Court for the Eastern District of New York and the body of the relator having been produced as directed on said day and the hearing on the said writ having been adjourned to the 9th day of January, 1922 and the relator having been admitted to bail in the sum of $5,000 and the respondent James M. Power, United States Marshal for the Eastern District of New York
16 having filed a return to the writ on January 9, 1922, from which it appears that the relator on the 15th day of June, 1920, was found guilty after a trial in the United States District Court for the Eastern District of New York under an information charging him with a violation of Section 21, Title II of the Act of Congress of October 28, 1919, and that on the 17th day of June, 1920, he was sentenced to pay a fine of $500 and to be imprisoned for 60 days, and that by an order of this court of the date of December 17, 1921, the relator was ordered to appear in this court on January 3, 1922, to comply with the sentence of the court and that on January 5, 1922, the relator was remanded to the custody of the respondent and the within writ having come on to be heard before me on the 9th day of January, 1922, and having been thereafter continued to the 23 day of January, 1922, and having been thereafter continued to the 6th day of February, 1922, and having been thereafter continued to the 28th day of February, 1922, and argument having been had thereon and after due deliberation by the court and the court having filed its written opinion, now upon the papers filed herein and upon all the proceedings had herein and on motion of Ralph C. Greene, United States Attorney for the Eastern District of New York, attorney for the respondent, it is

Ordered, that the writ of Habeas Corpus herein issued out of this court on the 5th day of January, 1922, be and the same hereby is dismissed, and the petitioner is hereby remanded to the
17 custody of the United States Marshal for the Eastern District of New York to serve his sentence under the commitment herein previously issued. Thomas I. Chatfield, U. S. D. J.

18 **Opinion.**

[Title omitted.]

Feb. 25, 1922.

Ralph C. Greene, U. S. Attorney; Henry J. Walsh, Assistant U. S. Attorney, of counsel.

Morris Kamber, attorney for Relator.

CHATFIELD, *J.*: The defendant has been commit-ed to serve a sentence for violation of Section 21, Title 2, of the Prohibition Law, and is before the court upon a writ of habeas corpus. By the writ of habeas corpus he seeks to object to the validity of the procedure by which he was brought into court, tried and convicted, although the time to appeal from said conviction has expired, and although

he is now in the position of not having any appeal pending from said judgment of conviction and sentence.

The defendant was arrested and tried upon an information, and he now contends that because he was sentenced to a jail where
19 hard labor may be required, or because he might be sentenced under such a charge to an institution where hard labor is possible or required, that the proceedings can be instituted only by indictment.

Prior to the adoption of the U. S. Constitution certain crimes were denominated as "infamous," in addition to the many crimes which in those days were classified as "felonies." As law and civilization have progressed, many crimes, even at that time constituted felonies, have been by law (statutory or otherwise) changed to misdemeanors.

The defendant argues that the definition of an infamous crime has not been changed, that by the language of Amendment V to the Constitution, such crimes are left forever triable by jury, and may be instituted only by indictment, even though the crime may be specifically denominated a misdemeanor, or by the length of punishment provided may come within the language of the last part of Section 335 of the Penal Code of the United States, which reads as follows:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

This statute went into effect in 1909, and the present case has arisen since that time.

Any objection to the sufficiency of the indictment or to occurrences during trial, which might be alleged as error, will be cured by failure to seek relief through the suing out of a writ of error,
20 and a writ of habeas corpus cannot be used as a writ of error. Glasgow v. Moyer, 225 U. S., 420, and cases therein cited.

But the defendant contends that where the court had no jurisdiction over the defendant, objection may be raised even during the serving of the sentence and without reference to whether there has or has not been an appeal by writ of error. It is necessary, therefore, to consider whether the United States obtained any valid jurisdiction over the defendant, and over the particular allegation of crime with which he was charged, by the filing of an information in the case. Concededly the information was sufficient to take the place of an indictment if the crime charged was a misdemeanor and not an infamous crime. The sentence actually imposed in this case was to the Essex County Jail in the State of New Jersey, which is an institution where what the defendant contends is the equivalent of "hard labor," that is involuntary work, is required as part of the discipline from those under confinement. Chap. 271, Laws of 1917, N. J.

It is unnecessary to discuss the procedure by which the Department of Justice has made arrangements for the receipt of federal prisoners, under which this court, as a matter of convenience, by

reason of the aforesaid arrangement, sends prisoners to this institution to serve sentence by virtue of Section- 5541 and 5546 of the Revised Statutes.

The defendant is not complaining of the choice of institutions and his sole proposition is that a charge under Section 21 of the Prohibition Law, by rendering the defendant liable to imprisonment
21 in an institution where the equivalent of hard labor accompanies sentence, subjects him to what has been by the Constitution preserved in the class of "infamous" crimes, and therefore that it is capable only of prosecution by indictment.

The question is important in that not only the Prohibition Law but many other of the U. S. Statutes define crimes which cannot be prosecuted upon information if the defendant's contention is correct.

Evidently a crime, even though called a misdemeanor, which carries a possible punishment of more than a year, is an infamous crime and cannot be prosecuted by information. Mackin v. United States, 117 U. S., 348; Ex parte Wilson, 114 U. S., 417. Some such so-called misdemeanors were reclassified by Section 335 of the Criminal Code in 1911. Some of the statutes are of later date, but the word misdemeanor is ineffective. (See the Jones Act of June, 1920.)

The question in the case at bar was decided in this court in the case of United States v. Nelson, 254 Fed., 889, in which opinion the language of the statutes is set forth at length. Their provisions are discussed in a quoted decision from United States v. Cobb, 43 Fed., 570. The Nelson case, however, was not conclusive, inasmuch as the information was filed "in time of war," under Section 12 of the Selective Service Law, and was therefore within the express exception to the Fifth Amendment of the Constitution.

In the case of Yaffee v. United States, 276 Fed., 499 (see also Hunter v. United States, 272 Fed., 235, and Brown v. United States, 260 Fed., 752) it was expressly held that the charge
22 of selling liquor under the Volstead Act was not an infamous crime, and could be prosecuted by information, citing ex parte Wilson, 114 U. S., 417, United States v. Lindsay-Wells Co., 186 Fed., 248, United States v. Quaritius, 267 Fed., 227, United States v. Achen, 267 Fed., 595, United States v. Baugh, 1 Fed., 784.

The argument in all of these cases is based upon the discussion in the Supreme Court in the opinion in ex parte Wilson, supra, which interprets the words "other infamous crime." It is said there that, "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another." It is also stated that by the first Judiciary Act whipping was treated as a punishment like fines or short terms of imprisonment, "but at the present day either stocks or whipping might be thought an infamous punishment."

It is unnecessary to quote from this decision further, nor from the cases of ex parte Karstendick, 93 U. S., 396, Mackin v. United States, supra, Parkinson v. United States, 121 U. S. 281, United States v. De Walt, 128 U. S., 393, Medley, Petitioner, 134 U. S., 160,

In re Mills, 135 U. S., 263, In re Classen, 140 U. S., 200 (at p. 204), to substantiate the proposition that the classification of the crime either as a felony or misdemeanor, and the determination as to whether it is infamous, depends upon the penalty which may be imposed at the time of sentence.

A crime which was considered "infamous" at the time of the adoption of the Constitution may, at the present time, fall without that category, as the result of subsequent legislation following the trend of public opinion. On the other hand, a crime not known to the common law may have been defined by statute, or a new penalty may have been provided as to some crime previously considered trivial, and its classification as a felony or other infamous crime depends upon the possible scope of sentence at the time when it is imposed.

In the case of In re Logan, 144 U. S., at p. 303, it was held that certain crimes recognized as established in definition and essential elements at the time of the adoption of the Constitution, did not, in the absence of express statute of Congress, change from time to time, if the name of that particular crime was narrowed or broadened under state legislation.

But this in fact decides the proposition that Congress has the right, under the Constitution, to remove a crime from the infamous class, or to change a certain act from the category of felony to that of misdemeanor.

But the defendant contends that Congress has not expressly removed the crime in the case at bar from the class of "infamous" crimes even, though calling it a misdemeanor, inasmuch as Congress allows and apparently contemplates the use of institutions where the so-called infamy of "hard labor" or its equivalent is compelled.

A similar situation with respect to the competency of witnesses was considered in the case of Rosen v. United States and Pakas v. United States, 245 U. S., 467, affirming 237 Fed., 810, and 240 Fed., 350. The dissenting opinion of the Court of Appeals in 237 Fed. at p. 811, presented a similar contention to that of the defendant in the case at bar. But, as settled by the Supreme Court, following the principle set forth in the Logan case, supra, the competency of witnesses in criminal cases depends upon the condition of the law under acts of Congress and judicial construction of those laws with due recognition of the progress and knowledge and public opinion. "The dead hand of the common law of 1789" is not "to be applied to such cases as we have here."

Similarly the meaning of the words "infamous crime" has been changed under the acts of Congress as interpreted in the United States Courts, and is not necessarily in exact similarity to the meaning of those words under State Statutes. Both in State and United States Courts, however, the application of the term "hard labor" *have* become limited in effect. Reform and humane legislation has given those in prison the benefit of a chance to labor both for their mental and physical well being, and even in some cases for the purpose of enabling them to earn some help for their dependent families.

To hold that the steps forward in aiding prisoners and in removing unnecessary hardship are but an extension of the "infamy" which attached to a felon, is contrary to common sense as well as law and no legislation is needed to prevent such an effect. The principle of the Rosen case, supra, fully covers the case at bar.

In so far, therefore, as objection on this ground to a trial upon an information should be deemed waived if not raised on the trial or assigned as error upon appeal, it cannot be raised under a writ of habeas corpus, and the failure to sue out a proper writ of error disposes of the case.

If the question be considered from the standpoint of jurisdiction of the court over the defendant, in answer to the charge presented upon information, the writ must be dismissed upon the merits, and the defendant remanded to the Marshal to serve his sentence under the commitment previously issued. Thomas I. Chatfield, U. S. D. J.

Stipulation Setting Record on Appeal.

[Title omitted.]

It is hereby stipulated that the foregoing consists of a true transcript of the record, as agreed upon by the parties. Dated March 22, 1922. Morris Kamber, Attorney for Relator. Ralph C. Greene, Attorney for Respondent.

Certificate of Clerk.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. Gilkes, Jr., Clerk of the United States District Court for the Eastern District of New York, do certify that the foregoing is a true and correct transcript of the record, as agreed upon by the parties.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at the Borough of Brooklyn, City and State of New York, the 23rd day of March, 1922. Percy G. Gilkes, Clerk of the United States District Court, Eastern District of New York, by John A. Leavens, Deputy Clerk. [Seal of the United States District Court, Eastern District of New York.]

Endorsed on cover: File No. 28,929. E. New York D. C. U. S. Term No. 389. John H. Brede, appellant, vs. James M. Powers, United States marshal for the eastern district of New York. Filed May 15th, 1922. File No. 28,929.

TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Supreme Court of the United States

JOHN H. BREDE,
Appellant,

against

JAMES M. POWERS, as United States Marshal for the Eastern District of New York,
Appellee.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from an order of the United States District Court for the Eastern District of New York, the late District Judge, Hon. Thomas I. Chatfield, presiding, dismissing a writ of *habeas corpus*.

Brede, the appellant, was convicted in said court of a violation of the National Prohibition Act, and sentenced to be imprisoned for sixty days and to pay a fine of $5,000 (pp. 3, 5). He was prosecuted upon an information filed by the United States attorney April 7, 1920 (p. 3). No indictment or presentment by grand jury was ever found (pp. 3, 5). Being committed to the custody

of the marshal, he obtained a writ of *habeas corpus,* alleging that the crime of which he was convicted was an infamous crime within the meaning of the fifth amendment to the constitution for the reason that the court had power, because of the statutes of the United States and state statutes by federal law made applicable to federal prisoners in state penal institutions to sentence him to an infamous punishment, namely, imprisonment at hard labor (p. 4). The writ was dismissed (pp. 5-6), and he appeals.

Specification of the Errors Relied Upon.

Appellant relies upon all the errors assigned, namely:

1. The United States District Court for the Eastern District of New York, erred in dismissing the writ of *habeas corpus* and remanding him to custody.

2. Said court erred in holding that imprisonment in the County Jail of Essex County, New Jersey, is not imprisonment at hard labor.

3. Said court erred in holding that imprisonment in the County Jail of Essex County, New Jersey, for a term of sixty days is not an infamous punishment.

4. Said court erred in holding that the crime for which he was prosecuted and was convicted, as set forth in the record herein, is not an infamous crime within the meaning of the fifth

amendment to the constitution of the United States.

5. Said court erred in holding that the crime for which he was prosecuted and convicted, as set forth in the record herein, can be prosecuted in the United States District Court for the Eastern District of New York, by information and without indictment or presentment by the grand jury.

6. Said court erred in holding that the United States District Court for the Eastern District of New York had jurisdiction to pronounce the sentence and judgment of conviction in the record described.

7. Said court erred in construing and applying the constitution of the United States and particularly the fifth amendment thereto, for the reason said amendment, properly construed and applied, required his discharge from imprisonment, same being pursuant to conviction of an infamous crime without indictment or prosecution by grand jury (pp. 1-2).

Brief of the Argument.

I.

The court has jurisdiction.

The case involves the construction and application of that part of the fifth amendment to the constitution which provides that "no person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." It is involved *primarily* and *directly*. It is *necessary to a decision*. True, it may be necessary *incidentally* to examine and construe certain statutes in order to determine the *incidents*, to fix the *characteristics* of this particular crime, just as it is always necessary whenever a constitutional principle is invoked first to find out exactly what is the character of the thing or event which the constitution is asserted to protect or to forbid; yet, after the statutes defining this crime and fixing its punishment have been examined, it will be necessary to *construe* the constitution and to *apply* it to the particular state of facts which shall have been determined to be before the court. The case cannot be decided until the constitution first shall have been construed and applied.

II.

The order appealed from is erroneous for the reason that appellant was convicted of an infamous crime, that is, a crime for punishment of which the court had power to subject him to an infamous punishment, namely, imprisonment at hard labor, and since there was no indictment or presentment by grand jury, but prosecution on a mere information, the judgment of conviction was void and the writ of habeas corpus should have been sustained.

1.

If the crime of which appellant was convicted was an infamous crime, a trial upon a mere information could not give the court jurisdiction to pronounce judgment, and the judgment which the court attempted to pronounce was void, and subject to collateral attack by *habeas corpus*. We deem it unnecessary to argue this proposition.

Ex parte Wilson, 114 U. S. 417.
Ex parte Bain, 121 U. S. 1.
In re Claasen, 140 U. S. 200.

2.

The construction of the fifth amendment to the constitution is this: an infamous crime is one that carries an infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court *has power* to inflict.

Ex parte Wilson, 114 N. S. 417.
Ex parte Bain, 121 U. S. 1.
Parkinson v. *United States,* 121 U. S. 281.
In re Claasen, 140 U. S. 200.

Imprisonment *at hard labor* is an infamous punishment.

Ex parte Wilson, 114 U. S. 417.
Wing Wong v. *United States,* 163 U. S. 228.
United States v. *Moreland,* 258 U. S. 433.

This is just as true of imprisonment at hard labor in an institution maintained for punishment of minor offenders, such as a "house of correction," "workhouse," or "bridewell," as it is of similar imprisonment in an institution maintained for more serious offenders, such as a "state prison" or "penitentiary."

United States v. *Moreland,* 258 U. S. 433.

3.

Theory of the brief.

Our contention is this: Although the court attempted to sentence appellant to imprisonment in a penal institution in the State of New Jersey (pp. 4, 5), it had no power to do so, and that part of the judgment which specifies such place of imprisonment is void. The court did, however, have power to sentence appellant to imprisonment in a penal institution in the State of New York. Under the New York law, which by federal statute is made applicable to the discipline of federal prisoners in such institutions, imprisonment therein

is imprisonment at hard labor. If we be in error as to the power of the court to sentence appellant to imprisonment in New Jersey, it is not material, for the reason that such imprisonment would likewise be at hard labor.

4.

The power of the court as to the selection of a place of imprisonment.

In the beginning there were no federal jails or prisons. The first penal acts, though empowering the United States courts to punish by imprisonment, did not specify the places of incarceration. It was contemplated that the jails and prisons of the states would be open to federal prisoners.

The first congress (September 23, 1789) adopted a joint resolution:

> "That it be recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their jails to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, *under the like penalties as in the case of prisoners committed under the authority of such states respectively.* * * *" (1 Stat. 96).

The state legislatures generally acceded to this request (8 Op. Atty. Gen. 289, 291 [1857]).

Probably without this expression of congressional intention the United States courts would have been deemed to have the power to select any prison within their territorial jurisdiction open to

them (*Ex parte Geary*, 2 Biss. 485; 10 Fed. Cas. 137, case No. 5293). However, in 1821 (3 Stat. 646) another resolution was adopted which is now Rev. Stat. 5537-5538, which provides:

> "In a State where the use of jails, penitentiaries, or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such State, under the direction of the judge of the district, may hire, or otherwise procure, within the limits of such State, a convenient place to serve as a temporary jail" (5537).
>
> "The marshal shall make such other provisions as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States until permanent provision for that purpose is made by law" (5538).

There followed in 1825 (4 Stat. 118) an act now Rev. Stat. 5542:

> "In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose."

In 1835 (4 Stat. 777) came the present Rev. Stat. 5548:

> "Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or

by either, the court by which the sentence is passed may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the State or district where such court is held, the use of which is authorized by the legislature of the State for such purpose."

In 1864 (13 Stat. 74) was enacted the act, which, with its amendments, is Rev. Stat. 5546:

"All persons who have been, or who may hereafter be, convicted of crime by any court of the United States, including consular courts, whose punishment is imprisonment in a District or Territory or country where, at the time of conviction or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; * * *. And the place of imprisonment may be changed in any case when, in the opinion of the Attorney-General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel and improper treatment: Provided, however, That no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner or because of his treatment, after his conviction and during his term of imprison-

> ment, unless such change shall be applied for by such prisoner, or some one in his behalf."

And in 1865 (13 Stat. 500) came the present Rev. Stat. 5541:

> "In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose."

These last four cited acts must be construed together. It has been held that Rev. Stat. 5564 "may be treated as a proviso to sections 5541 and 5542" (*Ex parte Karstendick,* 93 U. S. 396, 401). It has been decided further that sections 5541 and 5542 define the *only* instances in which a United States court can sentence a prisoner to confinement in a "state jail or penitentiary" within the state, that is, when the statute *requires* hard labor as part of the punishment or when the imprisonment is for more than a year, and, that, therefore, when the sentence is *in terms* to imprisonment merely, for a year or less, the court *has no power* to sentence the prisoner "to a suitable jail or penitentiary in a convenient State * * * designated by the Attorney-General."

In re Mills, 135 U. S. 263.
In re Bonner, 151 U. S. 242.

This is the only statute which permits a prisoner to be sent out of the state (save when imprisonment is to be "one year or more at hard labor" when it may be to a federal prison [26 Stat. 839]), and except where some statute otherwise provides the jurisdiction of the United States District Courts is limited to their territory.

Toland v. *Sprague,* 12 Pet. 300, 328.
Hernden v. *Ridgway,* 17 How. 423.
14 Op. Atty. Gen. 522.

Therefore, unless *In re Mills* and *In re Bonner* are to be overruled, it follows that so much of the judgment of conviction as pretends to designate an institution in the State of New Jersey as the place of imprisonment is void, as being beyond the power of the court.

To what place did the court have power to sentence appellant? Under Rev. Stat. 5548, *supra,* it had the power to sentence him to any "house of correction or house of reformation for juvenile delinquents within the state," providing the state legislature had so authorized (this statute does not apply to *juvenile* offenders; they are provided for by Rev. Stat. 5549), or under Rev. Stat. 5537-5538, to any other place within the state for which the marshal might make provision, except, of course, that under the decisions in the *Mills* and *Bonner* cases it would have to be some place other than the "state jail or penitentiary."

This leads us to an examination of the statutes of the State of New York to ascertain what institutions were "authorized by the legislature" of the state to receive appellant.

The New York Prison Law (L. 1909, Ch. 47):

"§157. *Imprisonment of criminals convicted of crime against the United States.* It shall be the duty of the agent and warden of the state prisons, in accordance with the provisions of section one hundred and fifty-eight, to receive into the said prison and safely keep therein, subject to the discipline of such prison, any criminal convicted of any offense against the United States, sentenced to imprisonment therein, by any court of the United States, sitting within this State, until such sentence be executed, or until such convict shall be discharged by due course of law; the United States supporting such convict, and paying the expenses attendant upon the execution of such sentence."

"§158. *Restrictions on imprisonment of United States prisoners.* It shall not be lawful for the superintendent of state prisons, or the agents and wardens, or managers or superintendents of any of the penal institutions in this state, to hereafter receive or permit to be received therein, any prisoner convicted in the United States courts, held without the State of New York, or in any state court other than that of the state of New York. It shall be lawful for the agents and wardens of the state prisons, and the managers of the reformatories of the state to receive prisoners convicted and sentenced in the United States courts in this state, for one year or more, upon proper contracts made for their care and custody, to be approved by the superintendent of state prisons; but no prisoners sentenced in United States courts in this state, for one year or more, shall be received in any penal institution in this state, except in the state prisons and reformatories as aforesaid."

The state reformatories at Elmira and Napanoch are "state prisons" within the meaning of this act, and for many years the United States courts within the state have sentenced convicts there.

Opinions, N. Y. Atty Gen. (1894), 366.

The county jails of the state are also open to United States prisoners. The New York County Law (L. 1909, ch. 16) provides:

> "§96. *Commitment by United States courts.* Such keeper shall receive and keep in his jail every person duly committed thereto, for any offense against the United States, by any court or officer of the United States, until he shall be duly discharged; the United States supporting such person during his confinement; and the provisions of this article, relative to the mode of confining prisoners and convicts, shall apply to all persons so committed by any court or officer of the United States."

The criminal jails within the City of New York are under the charge of the Commissioner of Correction of the City (New York Charter, L. 1901, ch. 466, §695), and although there seems to be no statute *expressly* authorizing the receipt of United States prisoners therein there is no statute prohibiting it, and as matter of fact they are used for the receipt of federal prisoners awaiting trial, and in times past they have been used for convicted United States prisoners serving their sentences.

5.

A sentence to any penal institution in the State of New York is a sentence to hard labor.

Rev. Stat. 5539 (formerly 4 Stat. 739, Act of June 30, 1834, ch. 63) provides:

> "Whemever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts off the State or Territory in which such jaill or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."

This statute was recently considered by this court (*Ponzi* v. *Fessenden,* decided March 27, 1922, 66 L. Ed.. 354), where it was said:

> "The section is only one of the many showing the spirit of comity between the state and national governments in reference to the enforcement of the laws of each. To save expense and travel, the Federal government has found it convenient, with the consent of the respective states, to use state prisons in which to confine many of its prisoners, and the Attorney-General is the agent of the government to make the necessary contracts to carry this out. In order to render this duty assumed by the state governments as free from complication as possible, the actual authority over, and the discipline of, the Federal prisoners while in the state prison are put on the state prison authorities. If the treatment or discipline is not satisfactory, the Attorney General can transfer them to another prison, but while they are there they must be as amenable to the rules of the prison as are the state prisoners."

A statute enacted in this "spirit of comity" can hardly be construed by placing a narrow technical construction upon the words "jail or penitentiary." These words were obviously intended to apply to houses of correction and reformatories as well as to state prisons, to jails and prisons maintained by a political subdivision of a state, such as a county or city, as well as to those maintained by a state itself. Indeed, the institution which the learned Chief Justice had particularly in mind was the "House of Correction" at Plymouth, Mass.* It would be totally subversive to discipline in any penal institution, no matter what its nature, to have a *specially favored class* of prisoners within its walls. States would be loath to receive United States convicts upon such terms. At the time of the passage of this act the United States was *wholly* dependent upon the "comity" of the states for the use of penal institutions (there were no federal jails priorto 1891 [26 Stat. 839]) and it is still *largely* dependent, and it could not have been intended to make demand for *unusual* accommodation in any of them. Indeed, it seems that from the very first the states have made for the United States prisoners in their jails "the same regulations as for their own, in the matter of discipline,

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* In Massachusetts there is the state prison at Boston which is the "general penitentiary and prison of the commonwealth" (Gen. Laws 1921, ch. 125, §11), and the commissioners of each county except one are required "to provide a house or houses of correction, suitably and efficiently ventilated, with convenient yards, workshops and other suitable accommodations * * * for the safe keeping, correction, government and employment of offenders legally committed thereto by the courts and magistrates of the commonwealth or of the United States" (*id.*, ch. 126, §8). Prisoners in the state prison "shall be constantly employed" (*id.*, ch. 127, §48). Prisoners in the houses of correction "may be employed," with certain limitations, in such industries as the keeper selects (*id.*, ch. 127, §§50-51).

subsistence and the necessaries of life" (8 Op. Atty. Gen. 289, 291).

That it was intended that federal prisoners in state institutions of whatever character they might be should be amenable to the local discipline is further borne out by the act of February 23, 1887, ch. 213; 24 Stat. 411, §1, providing:

> "It shall not be lawful for any officer, agent, or servant of the Government of the United States to contract with any person or corporation, or permit any warden, agent, or official of any State prison, penitentiary, jail, or house of correction where criminals of the United States may be incarcerated to hire or contract out the labor of said criminals, or any part of them, who may hereafter be confined in any prison, jail, or other place of incarceration for violation of any laws of the Government of the United States of America."

If it had not been contemplated that federal prisoners in lesser penal institutions, such as "jails" or "houses of correction," could be compelled to labor at all, it would have been quite unnecessary to prohibit the hire of their labor. At this time "houses of correction" were expressly approved for the incarceration of *"any* person * * * convicted of *any* offense against the United States *which is punishable by fine and imprisonment, or by either* * * *" (Rev. Stat. 5548).

The statutes of the State of New York, where they authorize the receipt of federal prisoners in state institutions, always expressly provide that the prisoner shall be subject to the prison disci-

pline; The Prison Law, §157 (quoted *supra*) provides that federal prisoners received in "the state prisons," *i. e.,* prisons, penitentiaries and reformatories, shall be received *"subject to the discipline of such prison,"* and the County Law, §96 (quoted *supra*) provides that *"the provisions of this article, relative to the mode of confining prisoners and convicts, shall apply to all persons so committed by any court or officer of the United States."*

What is the *discipline* of any of the penal institutions in the State of New York? What is the *mode* of confining them? *It invariably includes hard labor.*

The Prison Law (§171) provides:

> "§171. *Prisoners to be employed; products of labor of prisoners.* The superintendent of state prisons, the superintendents, managers and officials of all reformatories and penitentiaries in the state, shall, so far as practicable, cause all the prisoners in said institutions, who are physically capable thereof, to be employed at *hard labor,* for not to exceed eight hours of each day, other than Sundays and public holidays, but such *hard labor* shall be either for the purpose of production of supplies for said institutions, or for the state, or any political division thereof, or for any public institution owned or managed and controlled by the state, or any political division thereof; or for the purpose of industrial training and instruction, or partly for one, and partly for the other of such purposes."

The County Law (§93) provides:

> "§93. *Food and labor.* * * * [The] keeper shall cause each prisoner committed

to his jail for imprisonment under sentence to be *constantly employed at hard labor* when practicable, during every day, except Sunday, and the board of supervisors of the County may prescribe the kind of labor at which such prisoner shall be employed; * * *."

The New York City Charter (L. 1901, ch. 466, §700) provides:

"Every inmate of an institution under the charge of the commissioner [of correction; and this includes all the criminal jails in the city save houses of detention for children] whose age and health will permit shall be employed *in quarrying and cutting stone,* or in cultivating land under the control of the commissioner, or in manufacturing such articles as may be required for ordinary use of any department of the City of New York, *or in preparing and building sea walls* upon islands or other places belonging to the City of New York upon which public institutions now are or may hereafter be erected, *or in public works* carried on by any department of the City, or at such mechanical or other labor as shall be found from experience to be suited to the capacity of the individual."

And section 702 provides:

"The hours of labor required of any inmate of any institution under the charge of the commissioner shall be fixed by the commissioner. In case any person confined in any institution in the department shall refuse or neglect to perform the work alloted to him by the officer in charge of such institution * * * it shall be the duty of the officer in charge of such institution in

> which such person or persons is or are confined to punish him or them by solitary confinement, and by being fed on bread and water only, for such length of time as shall be considered necessary; * * *."

If "quarrying and cutting stone" and the other enumerated employments are not "hard labor," then surely because of the provisions permitting the commissioner not only to determine the kind but the hours of employment anyone who can be imprisoned there "is in danger of being subjected to an infamous punishment if convicted" (*Ex parte Wilson, supra*, p. 426).

The New York courts have construed these sections (*People ex rel. Gainance* v. *Platt*, 148 App. Div. 579). In that case Gainance was convicted of petit larceny as a first offender and sentenced to a term in the Albany County Penitentiary "at hard labor." He sued out a writ of *habeas corpus*, contending that the sentence was beyond the jurisdiction of the court since there was nothing in the statute defining the punishment for petit larceny which empowered the court to sentence him to "hard labor." But the court held that the words "at hard labor" added nothing, that because of section 171 of the Prison Law, *supra*, the sentence was necessarily one to hard labor whether the court said so or not. Indeed, this court has held that if the court has power to sentence to an institution where hard labor is part of the discipline the inclusion of the words in the sentence add nothing to it (*United States* v. *Pridgeon*, 153 U. S. 48, 62).

6.

We conclude, therefore, that since the court had power to sentence appellant to certain penal institutions of the State of New York, all of which require *hard labor* as part of the discipline, and that discipline would have been required of appellant, not only because of the statutes of the state which expressly so provide, but because of the comity between state and United States, of which Rev. Stat. 5539 is an expression, a comity that is limited only by the prohibition against contracting or hiring the labor of the prisoner, a comity which requires that the United States should not attempt to interfere in the management of the institutions of the state, the court had power to sentence appellant to a term at *hard labor,* which is an *infamous* punishment, which may not be inflicted except after indictment or presentment by grand jury.

7.

Imprisonment in either the institution to which appellant was actually sentenced, namely, the Essex County Penitentiary at Caldwell, New Jersey, or in the one to which the record avers he was sentenced, namely, the Essex County Jail at Newark, is imprisonment at hard labor.

In the court below both judge and counsel were in error as to the place selected by the Attorney General for the incarceration of federal prisoners sentenced by the United States District Court for the Eastern District of New York, to imprisonment for not exceeding a year. All believed it to be the Essex County *Jail* (pp. 3, 5, 7-8). We now chal-

lenge the record and assert that judge and counsel were in error; that the place designated by the Attorney General is the Essex County *Penitentiary.*

Since the designation of this prison by the Attorney General was no more than the regulation of an executive department, which federal courts must notice judicially (*Caha* v. *United States,* 152 U. S. 211, 221-222), this court will not be bound by the erroneous averments of the record, but will inform itself of the fact, inquiring, if necessary, of the Department of Justice (*Jones* v. *United States,* 137 U. S. 202, 214-216).

The Essex County "Penitentiary," so called, at Caldwell, is really a "workhouse," erected pursuant to the authority of an act of the New Jersey Legislature passed in 1799 (*Virtue* v. *Board of Freeholders,* 67 N. J. L. 139; 50 Atl. 360, 363). This Act (2 Gen. Stat. N. J. 1838) provides (§7):

> "That the master of such workhouse shall receive all such disorderly persons and others aforesaid, as shall be legally sent to him, and shall keep them to such work and labor as they are capable of and able to perform, during their continuance in the said house * * *."

The "work and labor" to which the inmates of the New Jersey workhouse are generally "kept" is "in breaking and crushing of stone and in road work" though this particular institution in Essex County seems to have a "more diversified industrial organization" than those in the other counties (*Barnes, History of New Jersey Penal Institutions,* p. 344). By any test the inmates of these workhouses are kept at hard labor.

But even if this sentence were what it purports to be, namely, a sentence to imprisonment in the County Jail of Essex County, it would be a sentence to hard labor.

Chapter 271 of the Laws of 1917 of New Jersey provides: "The board of chosen freeholders of any county in this state may cause to be employed within such county any and all prisoners in any county jail under sentence, or committed for non-payment of a fine and costs, or committed in default of bond for non-support of the family."

Now, what is "hard labor"? Bouvier (title "hard labor") defines it: "In those states where the penitentiary system has been adopted, convicts who are to be imprisoned as part of their punishment are sentenced to perform hard labor. This labor is not greater than many freemen perform voluntarily and the quantity required to be performed is not at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking, and such like employments." Anderson defines it (title "labor"): "State's prison convicts often are sentenced to perform 'hard labor.' This imports nothing more than ordinary industry at some mechanical trade." See also dissenting opinion of Mr. Justice Brandeis in *United States* v. *Moreland,* 248 U. S. 433, 444, describing the quality of the hard labor exacted at the workhouse of the District of Columbia.

"Hard labor" means *involuntary* labor—labor that reduces one to the status of a slave, the only involuntary servitude not abolished by the thirteenth amendment (*Ex parte Wilson,* 114 U. S. 417, 428-429).

So that the labor at which appellant would be "employed" at either the "Penitentiary" or the

County Jail of Essex County would be "hard labor" because it would be *involuntary servitude,* irrespective of whether it happened to be physically arduous or easy. Moreover, there seems to be no restriction as to the *kind* of labor the "freeholders" or the "master" can select. The statute gives them free rein. They can make it just as "hard," using the word in its ordinary sense, as they choose, and, as already noted, the test is not what is *likely* to be done, but what *may* be done.

8.

Any crime punishable by imprisonment is infamous.

Up to this point this brief has been concerned chiefly with the question of hard labor, because it has already been determined that hard labor is an infamous punishment.

But assuming that this offense is punishable by imprisonment only, does it follow that it is not infamous? What is the true test?

Whether the crime be called felony or misdemeanor is irrelevant. Prosecution by both indictment and information existed long before the adoption of the constitution. The origin of both was lost in antiquity (4 Blackstone 308-309). But in the growth of English law, developed as it was in struggles between king and people, it soon came to be recognized that information could be used in *misdemeanor* cases but could not be used in *felony* cases. The technical distinction between a felony and a misdemeanor was that conviction of felony resulted in forfeiture of goods and in the corruption of the blood, whereas conviction of mis-

demeanor did not carry these consequences. Nevertheless, it so happened that the punishment for felonies was inevitably death and punishment for misdemeanors was something else, when Blackstone wrote there were in England one hundred and sixty capital crimes. Because of this the real distinction between felony and misdemeanor soon came to be considered to be that a felony was a capital crime, and a misdemeanor was not, and both laity and law writers used this distinction, forgetting the original technical difference (4 Blackstone 94-95; 1 Bishop New Crim. Law, Sec. 615).

Following this distinction the writers, speaking of the cases in which informations could be used and of the cases in which indictments had to be used, said that it depended on whether the crime was a capital crime. Thus:

"But though, as my Lord Hale observes," wrote Bacon, "in all criminal causes the most regular and safe way, and most consonant to the statute of Magna Charta is by presentment or indictment of twelve sworn men, yet he admits that, for crimes *inferior to capital ones* the proceedings may be by information" (Abridgment Title Information A).

"But these informations are confined by the constitutional law to mere misdemeanors only; for, *whenever any capital offense is charged,* the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer for it," said Blackstone (Vol. 4, pp. 309-310).

Blackstone wrote only a few years before the adoption of our bill of rights and he well reflects the opinions of that day. It is clear, therefore, that at the time of the adoption of this amendment the law was this: A capital crime had to be prosecuted by indictment, any other crime could be prosecuted by information.

As we have said the requirement that the grand jury had to indict before a man could be prosecuted for capital crimes grew out of the struggles between the people and the kings. It was considered one of the great protections of the subject against kingly usurpation. To quote Blackstone again:

"But to find a bill there must be at least twelve of the jury agree, for, so tender is the law of England of the lives of its subjects that no man can be convicted at the suit of the King of any capital offense, unless by a unanimous voice of twenty-four of his equals or neighbors, that is, by at least twelve of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury of twelve more, finding him guilty upon his trial" (Vol. 4, p. 306).

"The founders of English law have, with excellent forecast, contrived that no man shall be called to answer the King for any capital crime, unless upon the peremptory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of any accusation, whether preferred in the shape of an indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England can-

not but subsist so long as this *palladium* remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first (as doubtless *all arbitrary powers,* well executed, *are the most convenient*) yet let it be remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nations are fundamentally opposite to the spirit of our constitution; and that, though *begun in trifles,* the precedent may gradually increase and spread to the utter disuse of jurors in questions of the most momentous concern" (Vol. 4, pp. 349-350).

And in 1784, five years before the adoption of our constitution, Erskine, in the Court of Kings Bench defending the Dean of St. Asaph said: "If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the Supreme Criminal Court, but could only commit him for safe custody, which is equally competent to every common Justice of the Peace. The grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it"

(quoted by Harlan, J., *Hurtando* v. *California,* 110 U. S. 516, 543).

This being the law at the time of the adoption of the constitution, did the drafters of the fifth amendment merely intend to preserve the law as theretofore it had been known in the mother country, or did they wish to improve somewhat on that?

Their experiences had shown them that the safeguards of the British Constitution as extolled by Blackstone and other writers were not quite enough. Their Declaration of Independence recited twenty-seven specifications of oppressions practiced in the colonies by the British king. One of these grievances was that "mock trials" had been fostered. They wished to form a more perfect state and to erect bulwarks that would be sufficient to protect the citizen from the arbitrary exercise of sovereign powers, whether by executive, by legislature or by court. They wished to protect the citizen against oppressive criminal prosecution; and they wanted these safeguards written into the fundamental law of the land where they would be safe from all attacks, open or subtle, made on the theory of *convenience* or otherwise. So they abolished *ex post facto* laws and bills of attainder *and they limited still further the permissive use of informations.* How? By *adding* to the requirement existing theretofore that indictments must be used for *capital crimes* the further requirements that *any other "infamous crime"* had to be so prosecuted.

Now what is an infamous crime? Not a felony. The constitution does not say "felony." It says "infamous crime." The term "felony" was known

as well then as it is now; indeed, the constitution itself uses the word at least twice (Art. I, Sec. 8; Art. 4, Sec. 2). There were and are no common law crimes against the United States so that whether an offense is a felony or a misdemeanor is wholly a matter of congressional definition. If Congress, by definition, can determine when informations may be used it can abolish the grand jury completely by defining every crime as a misdemeanor. It was not intended that this part of the constitution could be overridden by so facile a device as the choice of words made by the legislature. Therefore, the term "infamous crime" does not mean "felony." What does it mean?

Any crime conviction of which is presumed to damage a man's reputation in the community, is infamous. Where did the phrase "infamous crime" come from? As was pointed out in *Ex parte Wilson, supra,* p. 422, there are two kinds of infamy. The one concerns the "future credibility of the delinquent" and is discussed in the authorities dealing with the law of evidence. With this we have nothing to do. The other is "founded in the opinions of the people respecting the mode of punishment." *This is the one with which we are concerned. It is discussed in the authorities on the law of slander and this must have been the source from which the framers of the amendment selected the words "infamous crime," and shows what they meant by them.* An "infamous crime" is one, conviction of which is supposed *ipso facto* to destroy one's good name. Therefore, accusation of it implies damage, and special damage need not be averred or approved. In the opinions of the people it has been considered for a long time that

a crime punishable directly by imprisonment (*i. e.*, not imprisonment in default of the payment of a fine) in any sort of criminal jail or prison is "infamous." *Only offenses that are punishable by fine are not infamous* (*Odgers on Libel and Slander* [5th ed.], 38-43).

CONCLUSION.

The order appealed from should be reversed with directions to sustain the writ and discharge appellant from custody.

Dated, New York, April , 1923.

Respectfully submitted,

ROBERT H. ELDER,
OTHO S. BOWLING,
Of Counsel for Appellant.

INDEX.

AUTHORITIES.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

JOHN H. BREDE, APPELLANT,
v.
JAMES M. POWERS, AS UNITED STATES Marshal for the Eastern District of New York, Appellee.
No. 45.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The United States Attorney for the Eastern District of New York filed, on April 7, 1920, a criminal information charging John H. Brede with a violation of Section 21, Title II, of the National Prohibition Act. (41 Stat. 305.) On June 15, 1920, the defendant was placed on trial, and after a verdict of guilty by the jury, the judgment of the court was entered, by which defendant was sentenced to pay a fine of $500.00 and be imprisoned for sixty days. (R. 3.) The institution in which it was ordered the defendant be confined is the County Jail of Essex County, New Jersey. (R. 5.)

A writ of habeas corpus was issued on January 5, 1922, by the District Court for the Eastern District

of New York on the petition of defendant, and after a hearing it was ordered that the writ be dismissed. From the order and decree dismissing the writ of habeas corpus the applicant entered his appeal to this court.

Issues not properly raised by writ of habeas corpus.

Defendant sought by writ of habeas corpus to test the validity of the procedure by which he was tried, convicted, and sentenced. He claims that his constitutional rights were violated by proceeding against him by information rather than by indictment. He could have appropriately raised this question by writ of error but did not avail himself of that remedy and allowed the time to take a writ of error to expire, thus effectually acquiescing in the judgment rendered. From the judgment of the District Court he had, on this constitutional question, a right of review by this court by direct writ of error, or he could have taken the entire case to the Circuit Court of Appeals. Neglecting these remedies, he now tries to review the judgment of the District Court by habeas corpus. The Supreme Court has declared again and again that a writ of habeas corpus may not be used as a substitute for a writ of error (*Riddle* v. *Dyche*, U. S. Supreme Court decided, May 21, 1923; *Frank* v. *Mangum*, 237 U. S. 309, 326; *Glasgow* v. *Moyer*, 225 U. S. 420), but counsel in this and other cases seem unwilling to accept this conclusion. The District Court had general jurisdiction to determine whether the Prohibition law was violated.

If an information was an improper way to institute a criminal proceeding, the error was procedural and could have been corrected by the Circuit Court of Appeals or by this court. The District Court certainly had jurisdiction to say whether a proceeding by information was proper or improper, and where that general jurisdiction exists and the error, if any, can be corrected by writ of error, habeas corpus is not available. Under the authorities it is respectfully maintained that this appeal should be dismissed.

Questions Involved.

If, however, the court concludes that it may consider the appeal on its merits, three questions are presented by appellant's contentions:

1. Has the United States District Court for the Eastern District of New York power to sentence prisoners convicted in the Eastern District of New York to serve the sentence in the Essex County Jail at Newark, New Jersey?

2. Is a violation of Section 21, Title II, of the National Prohibition Act (41 Stat. 305) an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States?

3. Is a sentence of 60 days in Essex County Jail, New Jersey, and a fine of $500 for violation of Section 21, Title II, National Prohibition Act, an infamous punishment within the meaning of the Fifth Amendment to the United States Constitution?

ARGUMENT.

I.

Has the United States District Court for the Eastern District of New York power to sentence prisoners to serve sentence in the Essex County Jail at Newark, New Jersey?

Almost all of thirteen pages of appellant's brief are used in arguing the negative of this question, his position being that so long as jails within the State of New York are open to receive United States prisoners the court can not send them outside the State. The point, if established, does lend emphasis to his assertion that the "defendant is in danger of infamous punishment" (hard labor), even though the pronouncement of the court does not indicate it, because New York statutes provide for "hard labor" for all convicts, and the statutes of New Jersey, where he was sentenced, only require "employment" of prisoners.

The whole question, however, of the power of the court, acting upon the designation of the Attorney General, to send prisoners outside the state to serve their sentences has been so clearly stated by Chief Justice Waite, speaking for this court in *Ex parte Karstendick* (93 U. S. 396, 400 *et seq.*), that a somewhat lengthy quotation here is more pertinent than argument:

> It is conceded that Congress has the power to provide that persons convicted of crimes against the United States in one State may be imprisoned in another. Congress can cause

a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there; or it may arrange with a single State for the use of its prisons, and require the courts of the United States to execute their sentences of imprisonment in them. All this is left to the discretion of the legislative department of the Government, and is beyond the control of the courts.

Acting under this power, Congress, while recognizing as a rule the propriety of sentencing those convicted of crime against the United States to imprisonment in the jails or prisons of the State where their conviction was had, did, in 1864, to meet contingencies that might arise, enact that 'all persons who have been, or may hereafter be, convicted of crime by any court of the United States, not military, the punishment whereof shall be imprisonment in a District or Territory where at the time of such conviction there may be no penitentiary or other prison suitable for the confinement of convicts of the United States, or available therefor, shall be confined, during the term for which they may have been, or may be, sentenced, in some suitable prison, in a convenient State or Territory, to be designated by the Secretary of the Interior.' 13 Stat. 74. In 1872 the power of designating was transferred to the Attorney General. This provision is also reenacted in sect. 5546 of the Revised Statutes, the word 'jail' being substituted for 'other prison', and

> 'suitable jail or penitentiary' for 'suitable prison' in the original act. This section is to be construed in connection with the other sections which have been referred to. In fact, it may be treated as a proviso to sects. 5541 and 5542.
>
> The counsel for the petitioner do not dispute the validity of this legislation; but they claim that in this case the conditions precedent to the execution of the sentence in a prison outside of the State have not been complied with, and consequently that the case is not brought within the power of the court to make such an order.

That is precisely what petitioner herein contends (pp. 11–12 of his brief), that because the State of New York has not refused to receive prisoners of the United States at some of the "houses of correction for juvenile offenders" within the State of New York, the Attorney General is powerless, under Sec. 5546, to name a jail outside the State of New York as the place where appellant is to serve his sentence. In reply to such a contention Chief Justice Waite (supra) continues:

> * * * It is not enough that the jails and penitentiaries of the State may be used; they must also be suitable. Whether suitable or not is a question of fact. * * * The statute makes it the duty of the Attorney General to designate other places of confinement, whenever the jails or penitentiaries of a State are unsuitable or unavailable. * * * The order of the Attorney General is equiva-

> lent to a finding by him that the penitentiary of the State was unsuitable or unavailable for the confinement of criminals convicted under the laws of the United States. * * *
>
> Neither is it an objection to the order, as made, that the designation of the Attorney General is of a penitentiary alone. If the sentence of the court had been imprisonment in a jail, and the jails of the State of Louisiana had been found unavailable or unsuitable, a designation of some jail outside of the State might have been necessary before the court could have ordered a confinement outside of the State.

Appellant suggests that the above reasoning in the *Karstendick* case is made obsolete by the doctrine of *In re Mills* (135 U. S. 263) and *In re Bonner* (151 U. S. 242). It is difficult to discover from these two cases where he bases the statement. *In re Mills* refers solely to whether the court could sentence to a penitentiary when the statute under which defendant was charged did not specifically so provide and the sentence imposed was for a year or less. Since it is settled that "present day imprisonment in a State prison or penitentiary with or without labor is an infamous punishment" (*Mackin* v. *United States*, 117 U. S. 348, 352) the question as to whether Mills would be subjected to hard labor was not material. Neither was it material whether the prison was in or out of the Territory or State where he was sentenced. In the *Bonner case* (supra) it is also insisted that no statement contra to the *Karstendick* decision exists. It

affirms the *Mills* decision that a judge is without jurisdiction to sentence to the penitentiary, an infamous punishment, if the statute does not plainly so provide and if the sentence is for less than a year.

The *Karstendiek* opinion is good law to-day. At a later date than either the *Mills* or *Bonner cases* it has been quoted with approval by this court. (See *United States* v. *Pridgeon*, 153 U. S. 48, p. 60.)

II.

Is a violation of Sec. 21, Title II, National Prohibition Act, an infamous crime within the meaning of the Fifth Amendment to the Constitution?

From the face of the statute there is nothing so to characterize it. The violation of Sec. 21 is called a misdemeanor and its maximum punishment is a year's imprisonment.

It appears well settled that misdemeanors punishable only by a fine or by a fine and imprisonment not exceeding one year, unless the statute couples with the punishment some additional provision making the particular misdemeanor infamous, are not infamous crimes within the purview of the Fifth Amendment, and may be prosecuted by information. (*In re Bonner*, 151 U. S. 242; *Falconi et al.* v. *United States*, 280 Fed. 766, C. C. A. 6th Circuit; *Hunter* v. *United States*, 272 Fed. 235, C. C. A. 4th Circuit; *Robertson* v. *United States*, 262 Fed. 948, 950, C. C. A. 8th Circuit; *Brown* v. *United States*, 260 Fed. 752; *Blanc* v. *United States*, 258 Fed. 921, C. C. A. 9th Circuit; *United States* v. *Camden Iron Works*, 150 Fed. 214, East. Dist. Penna.; *De Four* v. *United*

States, 260 Fed. 596, 598, C. C. A. 9th Circuit; *Weeks* v. *United States*, 216 Fed. 292, 296, C. C. A. 2d Circuit).

In *In re Bonner* (supra) Mr. Justice Field very happily puts this present contention of the Government by observing (p. 257):

> If the offense be only a misdemeanor, not punishable by imprisonment in the penitentiary (*Mackin* v. *U. S.*, 117 U. S. 348) the accusation may be made by indictment of the grand jury *or by information of the public prosecutor*. (Italics ours).

Although appellant gravely maintains that any imprisonment whatever is an infamous punishment, and, therefore, a violation of Sec. 21, National Prohibition Act, which has imprisonment as the penalty constitutes an infamous crime, his more serious contention arises from an endeavor to show that provisions of *other laws* which become operative *after sentence* is passed make the punishment infamous and thereby retroactively cause the violation of the law to be classified as an infamous crime. This brings us to the third and most important consideration in this case:

III.

Is a sentence of 60 days in Essex County Jail, New Jersey, and a fine of $500, for violation of Sec. 21, National Prohibition Act, an infamous punishment?

Appellant says it is infamous because he asserts it *means* imprisonment "at hard labor." But how does he arrive at that conclusion? It is through a devious path. He starts with an offense against a

law (National Prohibition Act), which is only a misdemeanor, the punishment for which is a fine of not more than $1,000 or not more than a year in jail, or both. (Appendix, p. 22.)

In appellant's case the court imposed a very light sentence under the statute, to wit, sixty days. But appellant proceeds by reasoning to follow this sentence, as yet innocent of any appearance of infamy or hard labor, through Sec. 5546, Rev. Stat. (Appendix, p. 23) which gives the Attorney General power to designate the place of imprisonment; on through a letter dated May 7, 1919 (Appendix, p. 24) from the Attorney General, pursuant to said statute, designating the Essex County Jail, Newark, N. J., for prisoners sentenced for less than six months. His trail of reasoning next leads through Sec. 5539 Rev. Stat. (Appendix, p. 25) providing that a Federal prisoner serving his term in the jail or penitentiary of the State shall be exclusively under the control of the State officers having charge of the State Institution under the laws of the State; after which he lands us at the climax, found in the laws of New Jersey 1917, chapter 271, paragraph I (Appendix, p. 26) providing that the board of county freeholders may "*cause to be employed* any or all prisoners in any county jail under sentence."

After all this mental "trekking" we are brought upon the lurking "infamy" which appellant contends colors the sentence so as to make procedure by indictment necessary, and it consists solely of a provision in the *State* law regarding the *management* or

discipline of State prisoners, which he says through comity between State and Nation is made applicable to Federal prisoners while housed in the State institution. The most he thus has found is a transitory possible attribute of the sentence of imprisonment which the Federal Judge imposed. For we can not lose sight of the fact that under the authority of Sec. 5546, R. S., "the place of imprisonment may be changed in any case when *in the opinion of the Attorney General* it is necessary. * * * " It is conceivable therefore, that a part of the 60 days sentence may be served in New Jersey where appellant may be made to do some work and the balance of it served in a jail of Georgia where he could be flogged but would have no employment. (Sec. 1175, Park's Annotated Code of Georgia, provides for appointment of "whipping bosses," but the only "work" required by law of prisoners in Georgia jails is on chain gangs, in which no Federal prisoners are permitted, when the labor is *imposed by the judge* as a part of the sentence. Sec. 1166, Park's Annotated Code of Georgia, Vol. 6.)

Appellant's fallacy in assuming that provisions of a state statute regarding employment of prisoners may by virtue of the comity between state and nation be tacked on the actual sentence imposed by the Federal Judge and thereby give it the character of infamous punishment is based upon a strained and unwarranted construction of Section 5539 of the Revised Statutes. (Appendix, p. 25.) It provides that Federal prisoners when placed in a State jail or penitentiary shall be subject to the same "discipline

and treatment" as other prisoners. These words were not idly chosen. They mean what they say, "discipline" referring to punishment for infraction of rules and regulations of the institution and "treatment" referring to the conduct of prison authorities toward the convicts, the privileges enjoyed, and the duties imposed by the former upon the latter. Section 5539 can not mean that *all* provisions of State laws apply to United States prisoners, else why should Congress pass Section 5544 of the Revised Statutes (Appendix, p. 26) expressly enacting that the State's law fixing the schedule of credit of time allowed State convicts for good behavior shall apply to Federal prisoners? Surely if, as appellant contends, Section 5539 of the Revised Statutes was meant to make *all* provisions of state law referring to State prisoners apply with equal force and effect to Federal prisoners, it was unnecessary for Congress by solemn enactment of Section 5544 to give Federal prisoners the advantage of the State's "good-time law."

If the general language of Section 5539, *supra*, admits of such wide interpretation as appellant advances, then State laws providing for sterilization of prisoners and their release under indeterminate sentences would also apply to United States prisoners confined in state institutions.

Section 5547 of the Revised Statutes (Appendix, p. 26), which provides that "The Attorney General shall contract with the managers or proper authorities having control of such prisoners for the * * * proper employment of them," conclusively shows that

Congress did not intend the phrase "discipline and treatment" as used in Section 5539 to include their employment.

The authority of the Attorney General under Section 5547, *supra*, to contract relative to the employment of United States prisoners is a general power given without restraint other than that their labor can not be "hired out." (24 Stat. L. 411.) A long line of authorities beginning with *McCulloch* v. *Maryland* (4 Wheat. 316) has established the principle that a State law can not interfere with the exercise of a proper power of the Federal Government. (See *Ohio* v. *Thomas*, 173 U. S. 276; *Choctaw, etc., R. R. Co.* v. *Harrison*, 235 U. S. 292.) Applying the principles of law recognized by this court in these decisions, District Judge Knowles in *County of Lewis and Clarke* v. *United States*, 77 Fed. 732, decided that a State statute authorizing the use of county jails for the confinement of United States prisoners on certain terms as to fees was not binding on the United States, as, by 5547 of the Revised Statutes, the keeping and subsistence of such prisoners *is made a matter of contract*, under the control of the Attorney General.

We maintain, therefore, that the way in which United States prisoners can be employed rests solely in contract and that a State statute on the subject can not to any extent apply unless it is made to do so by specific provisions therefor in the contract of the Attorney General.

Congress must be presumed to have enacted Rev. Stat. Sec. 5546 knowing of the constitutional require-

ment in infamous crimes; knowing also of the last clause of Rev. Stat. Sec. 1022 providing for the use of informations; knowing also of the diverse requirements of various states regarding discipline of prisoners within their institutions and aware also of Rev. Stat. Sec. 5547, passed at the same time requiring the Attorney General to contract for prisoners' employment. It is inconceivable, therefore, that appellant's contention—viz., that the test whether the punishment is infamous or not depends on what may go on inside the prison walls rather than what punishment the statute names for its violation—can be within the intent of Congress. If so, Congress deliberately *permitted the Attorney General after sentence to change the character of the punishment and thereby change also the class of the crime—simply by moving the prisoner.*

The infamy that attaches to the judge's sentencing a man to hard labor has grown up from antiquity from two historical sources. One was the conviction of a crime which made a man so lose his standing in the community that his oath was thereafter valueless (*U. S.* v. *Shepard*, 1 Abb. 431; *U. S.* v. *Baugh*, 1 Fed. 784); the other was because, in the opinion of the people, the nature of the punishment itself was so repugnant as to characterize it infamous. Early punishment was death for *all* infamous crimes. With the growth of humanitarian ideas, as States abolished the death penalty for many offenses, they felt that a loss of reputation should take the place of a loss of life and, in substituting imprisonment for

"capital" punishment, provided usually that it should be accompanied by hard labor "publicly and disgracefully imposed." Both in popular conception and in legal results in many State penitentiaries infamous punishments have come to mean solitary confinement, cropped hair, wielding a pickax on the public roads, wearing conspicuous prison stripes, a ball and chain at the ankle, and having one's labor sold to the highest bidder. In spite of these pictures of it in the popular mind *infamous punishment has legally never been clearly defined.*

An infamous offense, Cooley says, "is one involving moral turpitude in the offender or infamy in the punishment, or both." But that is a circular definition and leaves us still to inquire where the boundary lines of "infamy" in punishments lie. Some few examples have become established.

The sentence is infamous if it is to be served in a State prison or State penitentiary whether at hard labor or not. (*Mackin* v. *United States*, 117 U. S. 348; *Jones* v. *Robbins*, 74 Mass. 329; *Ex parte Bain*, 121 U. S. 1; *Ex parte Wilson*, 114 U. S. 417; *Parkinson* v. *United States*, 121 U. S. 281; *In re Mills*, 135 U. S. 263, 267; *In re Classen*, 140 U. S. 200, 205; *United States* v. *Tod*, 25 Fed. 815; *United States* v. *Smith*, 40 Fed. 755; *United States* v. *Wong Dep Ken*, 57 Fed. 206.) The sentence also is infamous if imposed under a statute which itself compels hard labor. (*United States* v. *Moreland*, 258 U. S. 433.)

While commenting on the statute under which *Wong Wing* (163 U. S. 228) was sentenced, the ma-

jority opinion of this court reasons in the Moreland decision:

> * * * but the punishment *provided for by the Act* and which was pronounced against Wong Wing, that is imprisonment at hard labor, was decided to be a violation of the Fifth Amendment * * *. When *Congress went further and inflicted punishment at hard labor* it "must provide for a judicial trial to establish the guilt of the accused." And this because such punishment was infamous and prohibited by the Fifth Amendment * * *." (Italics ours.)

It seems significant that in the last case on this subject this court should have used the expressions "punishment provided for by the Act" and "when Congress went further and inflicted punishment at hard labor." They indicate that the gist of the infamy lies in the wording of the statute under which Moreland was convicted which made it a matter of public record that an infamous sentence had been imposed upon him. The contumely therefore is not in the specific duties or discipline imposed by the institution where he may be incarcerated, but in the record against him of a "sentence at hard labor" with all the stigma of involuntary servitude legal history has attached to those words.

To apply the *Moreland case* as appellant does is entering the "twilight zone" of constitutional safeguards. It plays false to the true spirit of our "American Bill of Rights" expressed in the first ten amendments to the Constitution to construe any of them into fetters to welfare and progress. That, this

court has often recognized, and since the days when Chief Justice Marshall in *Gibbons* v. *Ogden*, 6 Wheat. 448, sounded the warning against "powerful and ingenious minds" explaining away the true meaning of the Constitution and leaving it "totally unfit for use," many have been the interpretations by this court according to its spirit. Indeed on this very subject this court has recognized the principle of growth in the guarantees of the Fifth Amendment, in *Ex parte Wilson* (supra) by saying that what constitutes infamous punishment "might be affected by the changes of public opinion from one age to another." Practically, to serve a sentence without the kind of "hard labor" required of prisoners in almost every one of the better managed jails and penitentiaries in the country to-day is much more cruel and humiliating than to serve the time where the board of freeholders or governors of the institution have provided employment. The interest manifested by them in putting in the "employment" results in a more sanitary, less vermin-infested, and cleaner place. Having no institution of its own the Federal Government must place its short-term prisoners in state and county jails, nearly all of which now have some sort of "work" for the men. All of the better ones do. The Attorney General makes every effort to designate the latter kind for Federal prisoners. In the last decade the Federal courts and United States Attorneys have been loaded with the responsibility of enforcing a great number of new statutes, named (though I do not argue that the name is conclusive)

misdemeanors. They have only small fines and jail sentences as punishment. Is the Attorney General to designate a few old antiquated jails where the prisoners sit in idleness and filth as the place where these sentences are to be served lest the "employment" in a modern institution violate the constitutional rights of prisoners? Or is the United States Attorney to keep the grand jury almost constantly in session to present these numberless minor cases?

We respectfully submit that the guarantees of the Fifth Amendment to the Constitution do not require such wastefulness and obstruction. We believe further that this court meant no such extreme conclusions to be drawn from the *Moreland* decision; that it meant and plainly said that the infamy consisted in the fact that *Congress* had pronounced the penalty "imprisonment at hard labor" which words have come to have the distinct legal meaning of "infamous punishment."

The sort of "hard labor" that Moreland was obliged to perform had points of resemblance to the "hiring out labor of prisoners" which has been condemned by the Federal government. (Act of Feb. 23, 1887, ch. 213; 24 Stat. 411, No. 1.) Moreland was committed to the workhouse for the expressed purpose of earning money he failed to pay to support his minor children. Every day's labor brought fifty cents to this fund, the earning or "working out" of which was the gist of his sentence, made so by the purpose of the statute. We submit therefore that in the majority opinion of this court Moreland's case

presented about as accurate a picture of the old hated involuntary servitude for debt or crime, which the Colonists wished to guard against in inserting the Fifth Amendment in the Constitution, as modern life could furnish. In no respect does the instant case parallel Moreland's situation.

To summarize the points of difference: Brede's sentence did not provide for hard labor; Moreland's did. The statute under which Brede was sentenced did not in so many words permit the Judge to make the imposition of hard labor a part of the record against him; the statute under which Moreland was sentenced provided that hard labor was an inescapable part of the public record of his punishment. The kind of labor to be imposed upon Brede will depend upon the Attorney General and the Warden or freeholders of the Essex County Jail, as to whether it is in fact "hard" or "light" employment; Moreland's duties were by the statute intended to be "hard labor." The employment required of appellant Brede will have no pecuniary value; Moreland's services were to be worth fifty cents per day. Brede's work will be more in the nature of health-preserving exercise, and an examination of the reasons leading to the passage of the New Jersey law, requiring "employment" of all prisoners, would indicate that the health of the prisoners had been the impelling motive for the passing of the statute. (See Report New Jersey Prison Inquiry Commission, vol. 2, p. 636.) In Moreland's case there was no concealment of the fact that the statute was intended to compel him to perform *labor*

which, presumably, he had shirked when evading the support of his minor children.

In the instant case the court had no power to administer a sentence of imprisonment at hard labor for a violation of Sec. 21, National Prohibition Act. The court's power to sentence is limited by the statute under which defendant is charged; what happens after the prisoner is within the institution is administrative merely and not a part of the sentence.

In *United States* v. *Pridgeon* (153 U. S. 48, 60) this court makes an apposite quotation from the earlier case of *Ex parte Karstendick* (supra) as follows:

> The claim was made on behalf of the petitioner that 'where the punishment *provided for by the statute* is imprisonment alone a sentence to confinement at a place where hard labor is imposed as a *consequence* of the imprisonment is in excess of the power conferred.' Mr. Chief Justice Waite, speaking for the court, answered this contention by saying: 'We have not been able to arrive at this conclusion. In cases *where the statute* makes hard labor a part of the punishment it is imperative upon the court to include that in its sentence. But *where the statute requires imprisonment alone*, the several provisions which have been just referred to place it within the power of the court at its discretion to order execution of the sentence at a place where *labor is exacted as a part of the discipline and treatment* of the institution or not as it pleases.' (Italics ours.)

Mackin v. *United States* (117 U. S. 348–351) states the test of whether the punishment is infamous or not is "whether the crime is one for which the *statutes* authorize the *court to award* an infamous punishment." (Italics ours.) That read in connection with the recent statements of this court when commenting on the *Wong Wing case* in the *Moreland* decision forces the conclusion that *for a sentence of imprisonment to be infamous, if it is for a year or less, the attribute of infamy (hard labor) must be put in the statute by Congress and made by the sentencing judge a part of the public record against the defendant.*

Respectfully submitted.

JAMES M. BECK, *Solicitor General.*

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEPTEMBER, 1923.

APPENDIX.

PROVISIONS OF LAW.

The Fifth Amendment to the Constitution reads in part as follows:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger.

Section 1022 of the Revised Statutes reads:

> All crimes and offenses committed against the provisions of chapter seven entitled "Crimes" which are not infamous may be prosecuted either by indictment or by information filed by a District Attorney.

Section 21 of the National Prohibition Act reads:

> Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall

be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

Section 5546 reads as follows:

All persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a District or Territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia, the transportation and delivery shall be by the warden of the jail of that District; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal or the warden of the jail in the District of Columbia, only, to be paid by the Attorney General, out of the judiciary fund. But if, in the opinion of the Attorney General, the expense of transportation from any State, Territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of

imprisonment may be changed in any case, when, in the opinion of the Attorney General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment: *Provided, however,* That no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf.

MAY 7, 1919.

Mr. JAMES D. BELL,
United States Attorney,
Brooklyn, New York.

SIR: The designation contained in letter dated February 28, 1918, addressed to your office, of the Essex County Jail, Newark, New Jersey, as the place of confinement for defendants sentenced in your district for terms of not more than one year, is hereby amended to the extent that the Essex County Jail is designated for defendants who are sentenced to imprisonment for less than six months, and the Essex County Penitentiary, Caldwell, New Jersey, is now designated as the place of confinement for those sentenced for terms ranging from six months to one year, inclusive.

This change is made in the interest of the long-term prisoners, in view of the fact that the Essex County Jail is not equipped properly to handle prisoners sentenced for six months or over, and the authorities of that jail have requested that no more

prisoners be sent them whose terms are for six months or more.

Please present this matter to the Court, and request that these new designations be observed in future sentences, and also that prisoners now held in local institutions under sentence be committed in accordance with this designation.

For the Attorney General:

(Sgd.) WILLIAM L. FRIERSON,
Assistant Attorney General.

Section 5539 of the Revised Statutes reads as follows:

> Whenever any criminal convicted of any offense against the United States is imprisoned in the jail or penitentiary of any state or territory, such criminal shall, in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.

Section 5541 of the Revised Statutes reads as follows:

> In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.

Section 5544 of the Revised Statutes:

> The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but, in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any State for offenses against the United States shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary.

Section 5547 of the Revised Statutes:

> The Attorney General shall contract with the managers or proper authorities having control of such prisoners for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined.

Laws of New Jersey, 1917, chapter 271, par. 1, reads:

> The board of chosen freeholders of any county in this State may cause to be employed within such county any or all prisoners in any county jail under sentence, or committed for nonpayment of a fine and costs, or committed in default of bond for nonsupport of the family.

○

Supreme Court of the United States

JOHN H. BREDE,
Appellant,

against

JAMES H. POWERS, as United States Marshal for the Eastern District of New York.

APPELLANT'S REPLY.

Replying to Appellee's First Point.

This part of appellee's brief was written because the learned Assistant Attorney General wholly misconceived our theory. We do not take the position that the power of the court to send a short-term (*i. e.*, for a year or less) convict out of the state depends on whether the jails of the state "are open to receive United States prisoners" (appellee's brief, p. 4). We have not suggested that the *Karstendick* case is obsolete (*id.* p. 7). It is one of the authorities upon which we rely.

What we intended to say and believe we did say is this: Section 5546 (the one authorizing the Attorney General to designate a "suitable jail or penitentiary in a convenient State or Territory") is "a proviso to sections 5541 and 5542" (*Karstendick* case, p. 10), the sections determining when

the prisoner may be sentenced to "any State jail or penitentiary within the district or State." In all three sections the word "jail" means the same thing as "state prison" (*Karstendick* case, p. 401; *Mills* case, p. 271). That is, it is only when the statute *requires* hard labor or when the term of imprisonment is for *upwards of a year* that sentence may be to a "jail" (prison) or "penitentiary" either within or without the state.

Of course, Congress *could* give District Courts power to sentence short-term convicts to institutions beyond the limits of their ordinary jurisdiction, but it hasn't. The reason why it did not is plain. As a rule "propriety" requires that a prisoner should not be sent out of the state (*Karstendick* case, pp. 400-401), that is, he should not be imprisoned and banished, too. The shorter the term, *i. e.*, the smaller the offense, the more persuasive are the reasons why this should not be done. And although Congress was willing, when the facts justified, that a long-termer should be sent beyond the borders of his state they were unwilling that a short-termer should be so dealt with. If there happened to be no "suitable" place furnished by the state the United States could provide one (Sec. 5538). It didn't occur to Congress that the United States would be wholly at the mercy of the keepers of the local "old antequated" and "vermin-infested jails" (appellee's brief, pp. 17-18) unless it was fortunate enough to find the keeper of a jail in some other state who managed things better.

So we contend that the court below had no power to sentence appellant to an institution out of the state because the punishment provided by the statute is not of the character which permits that to

be done. The availability and "suitability" of the penal institutions of the State of New York have nothing to do with it. We described the character of those institutions because they are among the ones to which the court had the *power* to commit appellant.

Replying to Appellee's Third Point.

Here it is argued that a state statute imposing hard labor does not affect federal prisoners; that the word "disciplime" as used in section 5539 refers "to punishment for infraction of rules and regulations of the institution and 'treatment'" (appellee's brief, p. 12). That is, punishment meted out to insubordinate prisoners is "discipline," but punishment meted out regularly to all prisoners because the nature of the institution is penal, is not "discipline." That is not the way this court has construed the word:

> "If the offense is flagrant, the penitentiary with its *discipline* may be called into requisition" (*Karstendick* case, p. 399).

The contention seems to be that it is not the law of the state but the whim of the Attorney General which determines the character and extent of the "employment" imposed (appellee's brief, pp. 12-13). This is based upon R. S. 5547 which provides that the Attorney General shall contract for the "proper employment" of prisoners. That section was enacted as part of the Act of May 12, 1864, chapter 85 (13 Stat. 74). We do not think it was intended to repeat, in part, section 5539. Repeals by implication are not favored. What we think

it meant was this: the Attorney General had ruled not long before that under existing law state jailors could hire out the labor of federal convicts, and the money belonged to the state, nevertheless, the United States was required to pay the state for the prisoners' "nourishment and clothing * * * fuel and medical service * * * and ordinary wear and tear of the establishment" (8 Op. Atty. Gen. 289). We think that this part of section 5547 was intended to remedy that situation. It was intended to make the disposition of the revenue derived from the labor of the convicts a matter of contract. It was not until twenty-three years afterward that the hiring out of federal prisoners was forbidden (Act of February 23, 1887, ch. 213).

However this may be, if it be the fact that the Attorney General can contract for whatever kind and amount of "employment" he pleases—if this sentence, though *on its face* to a county jail in New Jersey can be changed at the Attorney General's whim to one in some other state where flogging will be substituted for work (appellee's brief, p. 11), how can anyone seriously say that *any* sentence of imprisonment meted out by a United States court is not infamous?

Finally, it is concluded that "the attribute of infamy (hard labor) must be put in the statute by Congress and made by the sentencing judge a part of the public record" (*id.* p. 21). That is, infamy doesn't depend upon *punishment* but upon *ink; words* and not *realities* control. If it be necessary to dispose of such a theory, this court has already done it:

> "An offense which the statute imperatively requires to be punished by imprisonment

'at hard labor,' and one that must be punished by 'imprisonment,' but the sentence to which imprisonment the court may, in certain cases, and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are, 'punishable' by imprisonment at hard labor" (*Mills* case, p. 266).

Dated, October 1, 1923.

Respectfully submitted,

OTHO S. BOWLING,
of Counsel for Appellant.

BREDE *v.* POWERS, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 45. Argued October 4, 1923.—Decided October 22, 1923.

1. The sections of the Revised Statutes governing the places in which sentences of imprisonment for crime may be executed are *in pari materia* and should be construed together. P. 11.
2. The power of the District Court to sentence to imprisonment in another State, in a penal institution designated by the Attorney General under Rev. Stats., § 5546, is not confined to cases in which the imprisonment is for more than a year or at hard labor (§§ 5541, 5542,) but exists also where the sentence is for imprisonment merely, for a year or less. *Id.*
3. Under § 21 of Title II of the National Prohibition Act, which declares any building, boat, vehicle, place, etc., where intoxicating liquor is manufactured, sold, kept, or bartered in violation of that title, to be a common nuisance, and provides that any person maintaining such nuisance shall be guilty of a misdemeanor and punishable by fine of not more than $1,000, or imprisonment for not more than one year, or both, the imprisonment imposed cannot be at hard labor or in a penitentiary; and, the offense, not being infamous, may be prosecuted by information. P. 12.
4. A law of New Jersey (1917, c. 271,) authorizing the board of chosen freeholders of any county to "cause to be employed" within the county any or all prisoners in any county jail, *construed* as not contemplating the requirement of labor as a punishment. P. 13.

279 Fed. 147, affirmed.

APPEAL from an order of the District Court for the Eastern District of New York discharging a writ of *habeas corpus* which had been sued out by the appellant to try the constitutionality of his sentence and commitment by that court to the Essex County Jail, New Jersey—a place designated by the Attorney General pursuant to Rev. Stats., § 5546. The sentence was based upon a conviction under an information which charged a violation of § 21 of Title II of the National Prohibition Act, 41 Stat. 314.

Mr. Otho S. Bowling, with whom *Mr. Robert H. Elder* was on the briefs, for appellant.

The order appealed from is erroneous for the reason that appellant was convicted of an infamous crime, that is, a crime for punishment of which the court had power to subject him to an infamous punishment, namely, imprisonment at hard labor, and since there was no indictment or presentment by grand jury, but prosecution on a mere information, the judgment of conviction was void and the writ of *habeas corpus* should have been sustained.

1. If the crime was infamous, a trial upon a mere information could not give the court jurisdiction, the judgment was void, and subject to collateral attack by *habeas corpus*.

2. An infamous crime is one that carries an infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court has power to inflict. *Ex parte Wilson*, 114 U. S. 417; *Ex parte Bain*, 121 U. S. 1; *Parkinson* v. *United States*, 121 U. S. 281; *In re Claasen*, 140 U. S. 200.

Imprisonment at hard labor is an infamous punishment. *Ex parte Wilson, supra; Wong Wing* v. *United States*, 163 U. S. 228; *United States* v. *Moreland*, 258 U. S. 433. This is just as true of imprisonment at hard labor in an

institution maintained for punishment of minor offenders, such as a house of correction, workhouse, or bridewell, as it is of similar imprisonment in an institution maintained for more serious offenders, such as a state prison or penitentiary. *United States* v. *Moreland, supra.*

3. Although the court attempted to sentence appellant to imprisonment in a penal institution in the State of New Jersey, it had no power to do so, and that part of the judgment which specifies such place of imprisonment is void. The court did, however, have power to sentence appellant to imprisonment in a penal institution in the State of New York. Under the New York law, which by federal statute is made applicable to the discipline of federal prisoners in such institutions, imprisonment therein is imprisonment at hard labor.

4. It has been held that Rev. Stats., § 5564, "may be treated as a proviso to §§ 5541 and 5542." *In re Karstendick,* 93 U. S. 396, 401. It has been decided further that §§ 5541 and 5542 define the only instances in which a United States court can sentence a prisoner to confinement in a "state jail or penitentiary" within the State, that is, when the statute requires hard labor as part of the punishment or when the imprisonment is for more than a year, and that, therefore, when the sentence is in terms to imprisonment merely, for a year or less, the court has no power to sentence the prisoner "to a suitable jail or penitentiary in a convenient State . . . designated by the Attorney General." *In re Mills,* 135 U. S. 263; *In re Bonner,* 151 U. S. 242.

This is the only statute which permits a prisoner to be sent out of the State (save when imprisonment is to be "one year or more at hard labor" when it may be to a federal prison, 26 Stat. 839); and, except where some statute otherwise provides, the jurisdiction of the United States District Courts is limited to their territory. *Toland* v. *Sprague,* 12 Pet. 300, 328; *Hernden* v. *Ridgway,* 17 How. 423; 14 Ops. Atty. Gen. 522.

Therefore, unless *In re Mills* and *In re Bonner* are to be overruled, it follows that so much of the judgment as pretends to designate an institution in the State of New Jersey as the place of imprisonment is void, as being beyond the power of the court.

To what place did the court have power to sentence appellant? Under Rev. Stats. § 5548, it had the power to sentence him to any "house of correction or house of reformation for juvenile delinquents within the State," providing the state legislature had so authorized (this statute does not apply to juvenile offenders; they are provided for by § 5549), or under §§ 5537–5538, to any other place within the State for which the marshal might make provision, except, of course, that under the decisions in the *Mills* and *Bonner Cases* it would have to be some place other than the "state jail or penitentiary."

5. A sentence to any penal institution in the State of New York is a sentence to hard labor. U. S. Rev. Stats., § 5539; *Ponzi* v. *Fessenden*, 258 U. S. 254; 8 Ops. Atty. Gen. 289, 291; Act February 23, 1887, c. 213, § 1, 24 Stat. 411; New York Prison Law, c. 47, Laws 1909, §§ 157, 158, 171; New York County Law, c. 16, Laws 1909, §§ 96, 93; New York City Charter, c. 466, Laws 1901, §§ 697, 700, 702; *People ex rel. Gainance* v. *Platt*, 148 App. Div. 579; *United States* v. *Pridgeon*, 153 U. S. 48.

6. We conclude, therefore, that since the court had power to sentence appellant to certain penal institutions of the State of New York, all of which require hard labor as part of the discipline which would have been required of appellant not only because of the statutes of the State which expressly so provide, but because of the comity between State and United States, of which Rev. Stats., § 5539, is an expression,—a comity limited only by the prohibition against contracting or hiring the labor of the prisoner, and which requires that the United States should not attempt to interfere in the management of the insti-

tutions of the State,—the court had power to sentence appellant to a term at hard labor, which is an infamous punishment, which may not be inflicted except after indictment or presentment by grand jury.

7. A sentence to imprisonment in the County Jail of Essex County, would be a sentence to hard labor. Chapter 271 of the Laws of 1917 of New Jersey provides: "The board of chosen freeholders of any county in this State may cause to be employed within such county any and all prisoners in any county jail under sentence, or committed for non-payment of a fine and costs, or committed in default of bond for non-support of the family."

The labor at which appellant would be "employed" would be "hard labor," because it would be involuntary servitude, irrespective of whether it happened to be physically arduous or easy. Bouvier Law Dict., "Hard Labor"; *United States* v. *Moreland*, 258 U. S. 433, 444, (dissent); *Ex parte Wilson*, 114 U. S. 417, 428. Moreover, there seems to be no restriction as to the kind of labor the "freeholders" or the "master" can select. The statute gives them free rein. They can make it just as "hard," using the word in its ordinary sense, as they choose, and, as already noted, the test is not what is likely to be done, but what may be done.

8. Any crime punishable by imprisonment is infamous. An infamous crime is one, conviction of which is supposed *ipso facto* to destroy one's good name. Therefore, accusation of it implies damage, and special damage need not be averred or proved. In the opinions of the people, it has long been considered that a crime punishable directly by imprisonment, (not in default of the payment of a fine,) in any sort of criminal jail or prison, is "infamous." Only offenses that are punishable by fine are not infamous. Odgers on Libel and Slander, 5th ed., 38–43.

Mr. Solicitor General Beck and *Mrs. Mabel Walker Willebrandt*, Assistant Attorney General, appeared for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Dismissal of a writ of *habeas corpus* is assailed by this appeal. It was issued to review the legality of a conviction upon information and a sentence of imprisonment upon it. In detail of the grounds and justification of it, the charge of the petition is that appellant was proceeded against in the District Court upon an information charging him with a violation of § 21, Title II, of the Act of Congress of October 28, 1919, c. 85, 41 Stat. 305, 314, the National Prohibition Act, and convicted on the 17th day of June, 1920, and sentenced to pay a fine of $500.00, and be imprisoned for sixty days. In execution of the sentence it is alleged that he was committed to the custody of the appellee, he being the United States marshal for the Eastern District of New York.

The further allegation of the petition is that the court "never acquired jurisdiction of the pretended criminal action upon which, in form, it tried and condemned" him, "for the reason that the crime of which" he "was charged and for which said Court sought to try and condemn" him "is an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States and no presentment or indictment of a Grand Jury charging same, was ever filed or presented."

After hearing, the writ was discharged and appellant was remanded to the custody of the marshal to serve his sentence under the commitment, which was to the county jail of Essex County, New Jersey.

Is the contention of appellant justified in that his was a conviction and commitment of an infamous crime? It is upon this contention that his petition rests.

It has been decided that a crime takes on the quality of infamy if it be one punishable by imprisonment at hard labor or in a penitentiary, and must be proceeded against upon presentment or indictment of a grand jury. *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348; *United States* v. *Moreland*, 258 U. S. 433. And such is the quality of the crime and the procedure against it if the statute authorizes the court to condemn to such punishment. See also *In re Bonner*, 151 U. S. 242; *In re Mills*, 135 U. S. 263.

Or, to put it as counsel puts it, "The construction of the Fifth Amendment to the Constitution is this: An infamous crime is one that carries infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court *has power* to inflict."

To show the pertinence of the test and its adaptation to the case, it is the contention of the appellant that the court had power, and only power, to sentence him to imprisonment in a penal institution of New York, and that by the law of the State, by federal statute made applicable to federal prisoners therein, imprisonment is at hard labor.

The argument by which the contention is attempted to be sustained is somewhat strained. It rests upon the power the statutes give to the courts to specify the places of imprisonment, which began, it is said, in 1789. By a resolution then passed, the state legislatures were recommended to receive and keep prisoners committed under the authority of the United States "under the like penalties as in the case of prisoners committed under the authority of such States respectively. . . ." 1 Stat. 96.

The purpose thus expressed was in substance repeated subsequently, and §§ 5537 and 5538, Rev. Stats., reproducing a resolution adopted in 1821 (3 Stat. 646), §§ 5542 and 5548, reproducing 4 Stat. 118, and 4 Stat. 777, are

cited. Sections 5546 and 5541 are also cited, they having their origin in 13 Stat. 74, and 500.

It is provided in §§ 5537 and 5538 that, where a State does not allow the use of its jails to United States prisoners, the marshal under direction of the court may hire or procure a temporary jail, and that the marshal shall make provisions for the safe keeping of prisoners until permanent provision for that purpose is made by law.

By § 5542, where the sentence is imprisonment to hard labor, the court may direct its execution "within the district or State where such court is held."

Section 5548 provides that where punishment for an offense is by fine or imprisonment it may be executed in any house of correction or house of reformation for juvenile delinquents "within the State or district where" such court is held.

Section 5546 provides that the place of imprisonment, where there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, may be in some suitable jail or penitentiary in a convenient State or Territory to be designated by the Attorney General. And power to change is given to the Attorney General.

The provisions of these sections seem adaptive to all imprisonments and to all grades of crime. In other words, have an adaptive and harmonious relation, and such relation they were declared to have in *In re Karstendick*, 93 U. S. 396. Appellant, however, contends that § 5546 may be treated as a proviso of §§ 5541 and 5542, and that the latter sections "define the only instances in which a United States court can sentence a prisoner to confinement in a 'state jail or penitentiary' within the State, that is, when the statute requires hard labor as part of the punishment or when the imprisonment is for more than a year, and that, therefore, when the sentence is in terms to imprisonment merely, for a year or less,

the court has no power to sentence the prisoner 'to a suitable jail or penitentiary in a convenient State . . . designated by the Attorney General.'"

We are not impressed with the contention. The reasoning to sustain it is that Congress "could give District Courts the power to sentence short-term convicts to institutions beyond the limits of their ordinary jurisdiction, but it hasn't." And further, "although Congress was willing, when the facts justified, that a long-termer should be sent beyond the borders of his State, they were unwilling that a short-termer should be so dealt with."

The reasoning does not convince us. We prefer, and accept, the clear and direct power given to the Attorney General (§ 5546), and there is nothing in *In re Mills* and *In re Bonner* that militates against it.

In re Mills decided that when a statute does not require imprisonment in a penitentiary, a sentence cannot impose it unless the sentence is for a period longer than one year. *In re Bonner* is to the same effect. In other words, the sentences cannot transcend those of the statutes. In both cases the sentences were convictions upon indictments. They are authorities against, not for, the appellant. His contention changes the penalty of the statute and therefore repels. The statute provides that, for the offense here charged, the offender shall be fined not more than $1,000 or imprisoned not exceeding one year, or both. (§ 21.) Where the charge is selling, as in the *Wyman Case, post,* 14, the punishment, for the first offense, is a fine not more than $1,000, and imprisonment not exceeding six months. National Prohibition Act, § 29, 41 Stat. 316.

The statute excludes the imposition of hard labor or imprisonment in a penitentiary. Under the contention of appellant both would be imposed. Imprisonment must be, is the assertion, in a New York penitentiary, and at hard labor, the latter consequence because of the law of New York.

Appellant, while particularly insistent upon the New York law and the absence of power to imprison elsewhere than in a New York institution, however, contends that the imprisonment in the Essex County jail is at hard labor because the conduct or discipline of that jail requires or permits the imposition of hard labor, and thereby constitutes the crime infamous. If that can be so held it gives the court power to transcend the statute which, as we have said, does not include hard labor in its punishment. But such peremptory requirement cannot be assigned to the New Jersey law—neither employment at hard labor nor any labor. The law is made adaptive to circumstances, made so by committing its administration to the judgment of the freeholders of the county, and it is limited to prescribing suitable employment of prisoners to accomplish the purpose of the law. Laws of New Jersey of 1917, page 888. The law gives no indication that the employment is or may be prescribed as punishment. It proceeds along other lines.

It follows that the sentence of the court was not intended to be and could not have been to imprisonment at hard labor.

We find no error in the decision of the court in discharging the writ and its action is

Affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS concur in the result.